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IMPLEMENTATION OF FIDUCIA SECURITY EXECUTION IN INDONESIA: IN PRESPECTIVE OF PRINCIPLE JUSTICE

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ABSTRACT

Fiducia financing institutions play a role in fulfilling community needs, especially in fulfilling the ownership of movable objects such as vehicles. The problem that arises in fiducia guarantee is the occurrence of default in form of bad credit or delay in paying installments to creditors. This research purpose to know process execution of fiduciasecurity in Indonesia, and to see fiducia agreement from the principle of justice. The research method used secondary data from the decision of the Supreme Court of Indonesia and analyzed using deduction logic. Creditors cannot executeguarantee of the object of fiducia security unilaterally, unless agreed betweencreditor and debtor in default and the debtor is willing to submitobject of guarantee voluntarily. Standard agreements made by unbalanced parties give rise to misuse of circumstances. The party who has a dominant position is exploiting this situation, namely creditors. With this decision, it has been able to realize the justice of a contract that starts with a standard agreement.

INTRODUCTION

Meeting the needs of the community(Wu & Saunders, 2016) from time to time increasing(Pelligra, 2010), thus requiring a financing institution that can solve the financing problems(Farrell & Löw Beer, 2019). In the previous financing model it was known as pawning which had to be accompanied by delivery of the physical object to pawning recipient. Including fulfillment of ownership movable objects, namely motor vehicles, through financing institutions is increasing. To meet these needs, a fiducia financing institution was born, where the relationship between fiducia grantor (debtor) and fiducia recipient (creditors) is a legal relationship based on trust(Shaikh et al., 2019). Fiducia

grantorbelieves that the recipient of fiducia wants to return property rights of the goods that have been handed over after the debt is paid. On the other hand, recipient of the fiducia believes that giver of the fiducia will not misuse collateral under his control. For example, a customer asks for credit from the bank(Subramanian & Tung, 2016), and what is used as collateral in the form of movable property but the movable property collateral is not handed over by the owner of the goods to the lender (bank) but is still controlled and used by the owner.

Problems that arise in the contract mass (Nwapi, 2017)financing(Sertsios, 2020)fiduciasecurity is the occurrence of default in the form of bad credit or late payment of installments against creditors. In the event of delays or bad credit, creditor will use dept collector to withdraw the motor vehicle that is the object offiduciasecurity and will carry out the auction process unilaterally. In its development, a lawsuit was filed by an Indonesian citizen who filed a judicial review of these provisions to the Constitutional Court, namely the execution by seizing a fiducia object in form of a motorized vehicle unilaterally by creditor because the debtor was in arrears of several installments.

Based on the lawsuit, the Indonesian Constitutional Court Number 18 / PUU-XVII / 2019 granted part of the petitioner's claim. The decision of Constitutional Court is that excessive power and without proper control of legal mechanisms, by equalizing position of the FiduciaSecurity Certificate with a court decision with permanent legal force, has resulted in arbitrary actions Fiducia Recipient to carry out the execution object of fiduciasecurity, even by legalizing it with all kinds of ways and without going through proper legal procedures and is an act against the law.

With the decision of the Constitutional Court, there has been a change in the execution system of fiduciasecurity credit agreement in Indonesia, namely the recipient fiducia rights or creditors receiving fiducia may not carry out the execution by themselves (Parate execution) but must submit a request for implementation toDistrict Court. So that in this paper we will discuss how the implications of the legal decision and whether the decision has met the principle of justice.

METHODOLOGY

This research is a type of normative legal research, namely research that uses secondary data sources. Secondary data sources consist of primary legal materials in the form of statutory regulations and decisions of the Constitutional Court. Furthermore, the data is analyzed using deduction logic, namely the withdrawal of major premises to minor premises, i.e. from things that are common to special things that can be withdrawn and concluded from this research.

DISCUSSION AND CONCLUSIONS

FiduciaSecurity Execution Provisions Prior to the decision of the Indonesian Constitutional Court Number 18 / PUU-XVII / 2019.

An agreement that gives rise to an alliance between the parties in this case is a fiducia agreement between a fiducia giver and recipient who is bound to each other in a fiducia agreement. The agreement itself is divided into three phases, namely pre-agreement, implementation of the agreement and post-agreement (Dora Kusumastuti, 2019). In the pre-agreement stage the content of the agreement will be agreed, and the next stage is the implementation of the agreement where what is agreed in the agreement is implemented and during the agreement is where the agreement has ended, but this agreement that has ended is still a problem if in the implementation of the agreement not met.

In this fiducia agreement is an Assurance Agreement that can not stand alone without a credit agreement as its main agreement (Lidya Mahendra, 2016). This guarantee agreement is an additional agreement or accessoir of the principal agreement or the principal agreement, namely the credit agreement. Things that are guaranteed by this debtor can be in the form of moving or non-moving objects. One of the most commonly used securities is fiducia securities. Fiducia is the transfer of title to an object as collateral but the debtor can still use the object as collateral.

Fiducia(Cash & Tsai, 2018)agreement is accesoir because the fiducia agreement is a complement to the debt and credit agreement. There are rights and obligations for the fiducia grantor (debtor) and the fiducia recipient (creditor)(Payne et al., 1996). FiduciaSecurity is a special material guarantee that gives preferred position to the fiducia recipient (creditor), compared to other creditors. The special rights possessed by a fiduciarecipient/ creditor are certainly different from other creditors who do not have objects specifically designated as collateral or other valid reasons to take precedence. Without a guarantee, the creditor will find it difficult to get his rights in accordance with the agreement, while the debtor has obtained his rights in the form of a loan given by the creditor.

To address current economic developments in line with the high public interest in financing, the Fidusia Guarantee Law not only provides legal protection to creditors / fiduciary recipients, but is also expected to provide strong legal certainty for users of securities institutions. According to Gustav Radbruch, law has three important aspects, namely, justice, finality and certainty. UUGaminan Fidusia made so that its implementation can lead to legal certainty (Khifni Kafa Rufaida, 2019).

The provisions regarding fiducia security are regulated in Law Number 42/1999 in Article 15 section (2) The Fiducia Security Certificate as referred to in section (1) has the same executorial power as that of a final and binding court decision; Article 15 section (3)If a debtor is in default, the Fiducia Recipient has the right to sell the Goods being the object of Fiducia Security upon its own power.

Analysis of Article 15 of Law no. 42/1999, it can be concluded that the legislators want to provide guarantees and protection of legal certainty for Fiducia Recipients (Creditors) in providing credit to Fiducia grantors (Debtors). In fact, this policy is very rational because in the accounts receivable agreement where the collateral includes: movable objects, where the control is in the hands of debtor, there must be a legal mechanism that can provide more protection to creditors, especially in the case of execution of fiducia collateral objects where creditors can perform execution at his own power, either in the form of confiscation or confiscation auction, without the intercession of judges who are final and binding the parties and fiducia grantors cannot refuse and are obliged to submit the object of the fiducia guarantee.

Other provisions in the FiduciaSecutiry Law in Article 29 Section (1) of Law no. 42/1999 which distinguishes the execution of objects that are objects of collateral in three ways, namely:

a. the implementation of the executorial title as referred to in Article 15 section (2) by the Fiducia Recipient.
b. the sale of the Goods being the object of Fiducia Security upon the power of the Fiducia Recipient through public auction and settling the payment of its receivables using the proceeds of such sale.
c. privately-made sale made under an agreement between Fiducia Grantor and Fiducia Recipient if such way can obtain the highest price to the benefits of the parties.

One of the characteristics of the specific material guarantee is that it is easy to execute. This is based on the consideration that in the special guarantee of the matter, the debtor has tied himself with the creditor to provide a guarantee specifically to the creditor in the form of certain objects belonging to the debtor in order to guarantee the debtor's obligations as set forth in the principal agreement if the debtor defaults. In addition to its specially designated objects, the special guarantee of the property also indicates a special relationship between the creditor and the debtor under the agreement. With this specificity, the execution mechanism also needs to be specifically regulated (lex specialis) which is different from the execution in general. Ease of execution is important in order to attract creditors to provide funds in the form of loans due to the confidence and legal certainty for creditors that the debtor will fulfill his obligations in the agreement and if not, the creditor will get the debtor's obligations repayment through the execution of the object used as collateral. Without this convenience, creditors are certainly reluctant to provide their funds in the form of loans to debtors. Moreover, objects of fiduciasecurity are generally movable objects whose value is not too high compared to fixed objects. With a value that is not too high, the creditor should not be harmed due to the cost of carrying out the execution in the event that the debtor defaults much higher than the value of the object. One of the ease of carrying out the execution of fiduciasecurity is the execution of the executable title.

The existence of an execution parate as regulated in Article 15 section (3) of the JF Law is of course related to the implementation of the execution as regulated in Article 29 of the JF Law, especially section (1) letter b and letter c. In contrast to the implementation of the title executorial which still requires court assistance in the form of a request for execution in the context of carrying out a forced attempt, the execution parate as stipulated in Article 15 section (3) of the JF Law is carried out without the need for court assistance as if executing its own property. This can be done through both public auctions and underhand sales based on the agreement of the fiducia grantor and recipient. Although the execution parate mechanism does not require a forced attempt in the form of a request for execution through the court, however, the execution parate still has an important meaning for the creditor if the object pledged as collateral is an intangible movable object such as shares and other receivables for which there is no need to physically deliver the object in order to carry out the execution. This mechanism will of course cut execution time and costs.

FiduciaSecurity Execution Provisions After the Indonesian Constitutional Court decision Number 18 / PUU-XVII / 2019

Based on Decision Number 18 / PUU-XVII / 2019 of the Constitutional Court, the decision:

1. State Article 15 section (2) of Law Number 42 of 1999 concerning Fiducia Security (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) as long as the phrase "executorial power" and the phrase "are the same as a strong court decision permanent law "contradicts the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted" against fiduciasecurity where there is no agreement on defaultand the debtor objected to voluntarily handing over the object which became fiducia security, then all legal mechanisms and procedures in the execution of the FiduciaSecurity Certificate must be carried out and apply the same as the execution of court decisions which have permanent legal force ";

2. State Article 15 section (3) of Law Number 42 of 1999 concerning Fiducia Security (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of Indonesia Number 3889) insofar as the phrase "default" is contrary to the Constitution of the Republic of Indonesia Year 1945 and has no binding legal force as long as it does not mean that "the existence of default is not determined unilaterally by the creditor but on the basis of an agreement between the creditor and the debtor or on the basis of legal remedies which determine the default".

3. Declare the Elucidation of Article 15 section (2) of Law Number 42 of 1999 concerning Fiducia Security (State Gazette of the Republic of Indonesia of 1999 Number 168, Supplement to the State Gazette of the Republic of

Indonesia Number 3889) as long as the phrase "executive power" is contrary to the 1945 Constitution of the Republic of Indonesia 1945 and does not have binding legal force as long as it is not interpreted "against the fiduciasecurity where there is no agreement on default and the debtor objected to voluntarily hand over the object offiduciasecurity, then all legal mechanisms and procedures in the execution of the FiduciaSecurity Certificate must be carried out and applies the same as the execution of court decisions which have permanent legal force ";

After the Constitutional Court Decision No. 18 / PUU-XVII / 2019 Recipient fiducia rights or creditors receiving fiducia may not carry out the execution by themselves (Parate execution) but must submit a request for implementation toDistrict Court. Parate execution can be done if there is an agreement on the default that has been determined at the beginning and the debtor is willing to submit the object of fiducia guarantee voluntarily. The Constitutional Court's ruling states that not all executions of the object of fiduciasecurity must bedone through the courts. Against the non-agreed fiduciasecurity of default between creditors and debtors, and the debtor objecting to voluntarily submitting the object of fiduciasecurity, then all legal mechanisms and procedures in the execution of the fiduciasecurity certificate shall be carried out and apply in the same way as a fixed law-acured court ruling.

If there is no default criteria agreed between debtor andcreditor in the contents of agreement, debtor is reluctant to submit object of fiduciasecurityto creditors, the court mediates to give permission to executewhen conditions have been met. Not all withdrawals of the object of collateral must be made through the court, because it will result in a flood of courtsin handling cases of execution of fiducia collateral objects besides manyother cases that must be resolved by the court.

The execution of fiducia collateral objects can be carried out by leasing companies as long as there is an agreement of a default clause and debtor voluntarily submits the object of fiduciasecurity, then execution parate can be carried out. The Constitutional Court ruling is notabort executorial power of the finance company, if there is no agreement ondefault, for example debtor does not pay installments at the timecertain and do not want to voluntarily surrender the object of fiducia security, thencan be executed by force through the court.

Article 15 section (3) states, if debtor is in default, the giver of fiduciahas right to sell fiducia security object. Constitutional Courtdetermining the default is not determined unilaterally by creditor but onbasis of agreement with debtors. If there is an agreement on default, thenfiducia security may not be executed alone by fiducia recipient (creditors) but must submit a request for execution to the CourtCountry. Constitutional Court decision aims to provide legal certaintyand a sense of justice between the leasing party and the debtor and preventing actionarbitrary execution by the creditor.

As described above, that after the Constitutional Court's decision, thefiducia rights receivermay no longer carry out the execution by themselvesbut must submit an application for implementation to the District Court. The decision of the Constitutional Court stated that not all object executionsfiduciasecurity must be made through a court but can also be doneparate execution. The clause of fiducia agreement does not regulate the clause ofdefault agreememt between creditor and debtor, and debtor objectingvoluntarily submit the object of fiducia security, then all mechanisms andlegal procedures in execution of fiduciasecurity must be carried out andapplies same as court decisions that have legal force. On the other hand, if there are no agreement criteria for default in fiducia agreement clause and debtor is reluctant to confiscate the collateral object by creditor, then executionconducted through district courts.

Withdrawal object of guarantee does not always have to be done through a court for example, a leasing company provides motorbike loans at maturitypayment debtors cannot make motorbike installment payments, thenleasing can attract the vehicle if debtor is in defaultvolunteered to give up motorbike. However, if debtor does not want to submitvoluntarily motorbikes as the object of fiducia security, leasing companycannot withdraw the motorbike unilaterally but must fileapplication to district court to carry out the execution of objectfiduciasecurity.

This Constitutional Court ruling does not invalidate powerexecutorial financing company, if there is a default, for example a debtordo not pay installments at certain times. Article 15 section (3) states if debtor in default, fiducia grantor has the right to sell object of fiducia securityunilaterally does not have legal force anymore, but execution candone after creditor (leasing) submits a request for execution throughDistrict Court. Based on decision of Constitutional Court, the default that determinedunilaterally by creditor not based on an agreement with debtor, thenfiducia security may not be executed alone by fiducia recipient (creditor) (Parate execution) but must submit an application toDistrict Court.

This decision is for sake of providing legal certainty and a sense of justice between creditor and debtor as well as preventing arbitrary acts of execution by creditors. DecisionConstitutional Court No 18 / PUU-XVII / 2019 which declared creditors (leasing) can no longer unilaterally execute or withdraw the object offiduciasecurity such as a vehicle or a house, based only on a certificate offiducia security. The Constitutional Court decides the financing institution (leasing) who wish to withdraw the vehicle must submit an application to District Court.

However, Constitutional Court stated that creditors can still do unilateralcarry out execution as long as the debtor acknowledges the defaultand voluntarily willing to submit object of fiduciasecurity. The decision of Constitutional Court does not eliminate executive rightsin Article 15 of Law Number 42 Year 1999 if debtor in default voluntarily surrenders the object of fiduciasecurity.

After decision of Constitutional Court No.18 / PUU-XVII / 2019 possible problems arise, when creditor submits applicationexecution object of fiducia security to District Court, before the verdictExecution of Fiducia Security from District Court, debtor or fiducia grantorthose who have bad faith can intentionally disappear the objectfiduciasecurity or debtor has moved address that can no longer be tracedits existence by creditors, so that it is detrimental to the creditor (finance company).

In addition, another possible problem arises is that if each execution of a fiduciasecurity object, fiduciarecipient or creditor must apply for execution of fiduciasecurity to the court, will cause the burden of duty of District Court will increase, whether any District Court will be able to handle the execution application case filed by leasing company. In terms of existing casesso far, quite a lot will be resolved by District Court, of coursethis will lead to a verdict on application for the execution ofexecution guarantee takes a long time as well and can be an opening for fiducia grantorwho has bad intention to do something that canharm to fiducia recipients.

Fiduciarecipient in this case leasing company canusing Article 15 section (3) states, if debtor in default, fiduciarecipient has the right to sell the object of fiducia security in his own power(Parate execution). Based on Article 15 section (3) fiducia recipients can doparate execution on condition that there is an agreement regardingdefault and the fiducia grantoris willing to hand over object of fiducia securityvoluntarily. Fiduciarecipient may not execute perform unilateral execution of security objects unilaterally. If not agreed in advance and thefiducia debtor is willing to submit object of fiduciasecurity voluntarily.

However, in practice, fiducia recipients are still found to have committed violations by creditor if fiducia grantorcommit default, leasing company as the fiduciarecipient commitsparate execution by party without notification to the fiducia grantor,even using the services of a debt collector which is clearly against the law.Fiducia recipient forces the vehicle to be towed byusing the debt collector's services, without prior notification andcompromise with the fiducia grantor. The debtor's position in this case is ata weak position by giving up object of fiducia security in form ofvehicle to debt collector.

And if the fiducia grantor still wishes to continue his credit, leasing companies charge debtors to pay for vehicle towing servicesby debt collectors plus unpaid credits. Leasing company onlydetermine unilaterally and not regulated in the agreement to take actionarbitrarily not in accordance with legal procedures that are detrimental to the debtorwho are in a weak position. Actions of the fiduciarecipient in this regardleasing is clearly at odds with the execution of the Fiduciasecurity as suchregulated in Article 29 of Law Number 42 Year 1999 concerning FiduciaSecurity and Constitutional Court Decision No. 18 / PUU-XVII / 2019 regarding the withdrawal of fiducia object of the fiducia grantorwho diddefault.

Principle of Justice in accordance with the perspective of the provisions of Article 1320 (Indonesian Civil Code) concerning the validity of the agreement that the agreement must meet the elements of agreement, skill, and certain matters and causes that are lawful. In a fiducia agreement, which is a complementary agreement to the credit agreement between creditors and debtors, it is an agreement that has been made in standard. Standard agreements in the development of consumer financing are needed because they are practical. Sluiter ” This standard agreement is not an agreement, because here the position of entrepreneur in the agreement is maker of private law (legio particuliere wetgever).

Pitlo classifies a standard agreement as a forced agreement (dwang contract), although theoretically juridical, the standard agreement does not meet the provisions of the law and by some legal experts it is rejected, but in reality the needs of the community go in a direction contrary to legal wishes. Sluiter ” This standard agreement is not an agreement, because here the position of the entrepreneur in the agreement is the maker of private law (Dora Kusumastuti: 2015)

Richard D. Taylor says undue influence is relational undue influence where the law presumes from the relationship of the parties, without any evidance of actual undue influence, that the contract is the result of improper pressure from one party (Taylor: 1998). Inequality(Martins & Saraiva, 2020)in the bargaining power in an agreement is due to, among others, mental weakness, with the inability of one party to discuss in the negotiation process (Clark: 1987).

An unbalanced agreement (inequality) is caused by the doctrine of undue influence (Garner: 1999) and the doctrine of unconscionability. Undue influence occurs when there is a confidential relationship with another party to the contract, in which the party having a special position has used persuasive methods to take unfair advantage of the other party. In this case, "persuasive" methods are used, not "forced" or "trick" methods.

The existence of these two doctrines will result in a contract against propriety. In common law countries, the doctrine of equity / good faith is known as the teaching of abuse of circumstances. Abuse of circumstances occurs when something prevents the other party from making an independent judgment, so that someone can make an independent decision. This situation occurs when one party is in an unbalanced position, where one party has a stronger position than the other (Khairandy, 2004).

Abuse of circumstances is not a stand-alone doctrine, this doctrine is an extension of the power of equity which gives the court the authority to intervene in an agreement in which there is an abuse of unbalanced position between the parties. State abuse is one of the reasons for the cancellation of the agreement, after dwaling, threats (bedreiging), fraud (bedrog) and abuse of circumstances (misbruik van omstandingheden). There are 2 elements in it,

according to Dunne, the abuse of the situation because of economic excellence, and because of psychology (HP Pangabean: 2002). Abuse of a situation is the movement of a person because of a special situation (bijzondere omstandigheden) to carry out legal action and other parties abuse the situation. In this case, it is a state of force / emergency (noodtoestand), dependence (afhankelijkheid), reckless (lichtzinningheid) and inexperience (onervarenheid) (Herlin Budiono: 2015). Unconscionability in modern contract, tre is many substantive unconscionability; language difficulties, illiteracy, ill health, old age, and youthfulness.

In its development in Indonesia and some civil law countries, abuse of circumstances with unconscionability is equated, namely equality due to an imbalance in the bargaining position of the parties, even though it is actually different. According to Ridwan Khairandy (2015) that the abuse of circumstances is result of an imbalance in bargaining position of parties towards an agreement, the weak party is always influenced by strong. Unconscionability is seen from the actor whose bargaining position is stronger to force or take advantage of transactions against the weaker bargaining position in certain circumstances that are in accordance with justice (equity).

The practice of commercial contracts that developed in this mass obtained data that entrepreneurs generally when carrying out contracts for practical reasons do not ignore complicated legal rules. A number of empirical data shows that commercial contracts are generally based on truss factor between contracting parties and respect for unwritten agreements. The contract is not just form and free will of compilers of the contract drawn up without limits, but the contract is result of the agreement or free will of the parties related to moral principles and justice.

Rawls, said that the concept of justice is a concept that provides a measure of the basic structural aspects of society. The relationship with social justice in Indonesia, to the context of justice in Indonesia, then subject of justice includes positive law which is reflected as rules in social life.

After Constitutional Court Decision No. 18 / PUU-XVII / 2019 executionsfiduciasecurity, states Article 15 section (2) the phrase "executorial power" andCourt decisions that have legal force are still contrary to the Constitution1945. Creditors who receive the fiducia cannot carry out direct executionunilaterally on the object of fiducia security, but must file a request for executionto the District Court. The phrase "default" contained in Article 15 section (3) Law On Fiducia Security, contradicts the 1945 Constitution and is nothas binding legal force. Creditors cannot executeguarantee of the object of fiducia security unilaterally, unless agreed betweencreditor and debtor in default and the debtor is willing to submitobject of guarantee voluntarily.

Principle of justice in accordance with perspective of provisions Article 1320 (Indonesian Civil Code) concerning the validity of an agreement is that the agreement must fulfill the elements of agreement, skill, and certain matters

and causes that are lawful. In a fiducia agreement, which is a complementary agreement to the credit agreement between creditors and debtors, it is an agreement that has been made in standard. Standard agreements made by unbalanced parties give rise to misuse of circumstances. The party who has a dominant position is exploiting this situation, namely creditors. With this decision, it has been able to realize the justice of a contract that starts with a standard agreement.

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